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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

73-841

HON. CALE J. HOLDER,
United States District Judge for the Southern District of Indiana,
Petitioner,

v.

ARTHUR BANKS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Hon. Cale J. Holder, Judge of the United States District Court for the Southern District of Indiana, respectfully petitions this Court to issue a writ of certiorari to the United States Court of Appeals to review the decision of that Court in an original action for mandamus captioned Arthur Banks v. Hon. Cale J. Holder, Cause No. 73-1332.

JURISDICTION

The Court of Appeals rendered its original decision on May 17, 1973 (Exhibit A) and thereafter on Oct. 1, 1973, by a vote of four to three, denied a petition for rehearing. (Exhibit B). Neither decision is yet reported. On

Oct. 5, 1973 Mr. Justice Rehnquist stayed the enforcement and effectiveness of the decision of the Court of Appeals. On Oct. 26, 1973 Mr. Justice Rehnquist granted petitioner an extension of time within which to file a petition for writ of certiorari to and including November 29, 1973. This Court has jurisdiction to review the decisions of the Court of Appeals pursuant to Title 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of that Court's bar and in particular

   (a) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and

   (b) whether such a denial is forbidden by the Sixth Amendment to the United States Constitution.

2. (a) whether the court rules and ethical standards which forbid an attorney in a criminal case from making extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment to the United States Constitution.

   (b) whether an attorney's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS, COURT RULES AND ETHICAL STANDARDS INVOLVED

Amendment I to the United States Constitution:

> "Religious and political freedom.—Congress shall make no law . . . abridging the freedom of speech. . ."

Amendment 6 to the United States Constitution:

> "Rights of the accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and pub-

lic trial by an impartial jury of the state and district wherein the crime shall have been committed . . . and to have the assistance of counsel for his defense."

Rules of the United States District Court for the Southern District of Indiana:

Rule1(f). "The Canons of Ethics of the American Bar Association as from time to time existing shall be the standards of conduct for members of the Sourthern Indiana District Bar."

Rule 27. "It is the duty of the lawyer not to release or authorize the releasc of information or opinion for dissemination by any means of public communication, in connection with pending or imminent criminal litigation with which he is associated, if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice."

"From the time of arrest, issuance of an arrest warrant or the filing of a complaint, information, or indictment in any criminal matter until the commencement of trial or disposition without trial, a lawyer associated with the prosecution or defense shall not release or authorize the release of any extrajudicial statement for dissemination by any means of public communication, relating to that matter and concerning:

"(1) The prior criminal record (including arrests, indictments, or other charges of crime), or the character or reputation of the accused, except that the lawyer may make a factual statement of the accused's name, age, residence, occupation, and family status, and if the accused has not been apprehended, a lawyer associated with the prosecution may release any information necessary to aid in his apprehension or to warn the public of any dangers he may present;

"(2) the existence of contents of any confession, admission, or statement given by the accused, or the refusal or failure of the accused to make any statement;

"(3) the performance of any examinations or tests or the accused's refusal or failure to submit to an examination or test;

"(4) the identity, testimony, or credibility of prospective witnesses, except that the lawyer may announce the identity of the victim if the announcement is not otherwise prohibited by law;

"(5) the possibility of a plea of guilty to the offense charge or a lesser offense;

"(6) any opinion as to the accused's guilt or innocence or as to the merits of the case or the evidence in the case."

American Bar Association's Code of Professional Responsibility and Canons of Judicial Ethics:

DR 1-102(A). "A lawyer shall not . . . (5) Engage in conduct that is prejudicial to the administration of justice."

EC 7-33. "A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an imparital tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established."

EC 7-36. "Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and

above-board in his relations with a judge or hearing officer before whom he appears.

DR 7-107. "(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

"(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

"(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

"(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

"(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

"(5) The identity, testimony, or credibility of a prospective witness.

"(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case."

STATEMENT OF THE CASE

This case commenced with the return of an indictment against respondent in the United States District Court for the Southern District of Indiana on December 14, 1972. Respondent, an inmate of the federal penitentiary at Terre Haute, Indiana, was charged with assaulting a guard at that institution. At the first arraignment held on December 20, 1972, respondent appeared and indicated that his counsel would be William M. Kunstler, having been engaged approximately one month previously. Because of Mr. Kunstler's absence at that hearing, the arraignment

was continued at respondent's request. On January 2, 1973, another arraignment was attempted, but because of Mr. Kunstler's absence, the arraignment was continued again at respondent's request. On February 2, 1973, the respondent again came before the court for arraignment, but again Mr. Kunstler did not appear. The court then entered a plea of not guilty for respondent. On March 21, 1973, Mr. Kunstler filed an application for leave to appear on behalf of respondent. In response to a request by the government for a hearing on the application, petitioner held a hearing on April 1, 1973. At that hearing it was shown that Mr. Kunstler had on various occasions since February 9, 1973 (the date on which Mr. Kunstler states he became counsel for respondent) made in Terre Haute or Indianapolis the following statements to public audiences or to the news media concerning the pending criminal case:

(1) "that it was his client Banks who was assaulted by the prison guards;

(2) "that the charge against Banks is purely retaliative . . . a cheap little way of getting back at him for being a trouble-maker;

(3) "that Mr. Kunstler was certain he (Banks) was brutalized by the guards;

(4) "that it is a common cover-up tactic in order to protect the guards to file charges against Banks;

(5) "that all the evidence is inside the prison walls, under the control of the authorities who brought the charges against Banks;

(6) "the word of a guard is always taken over that of an inmate;

(7) "that Banks got into all this trouble because he doesn't act like most of the black inmates who 'Uncle Tom' it inside;

(8) "that there is a lot of antagonism against Banks because his wife is white;

(9) "that Attorney Kunstler urged students at Terre Haute to organize demonstrations in support of Banks and to fill the courtroom with sympathetic spectators during the trial;

(10) "That 'Anything they can do to call attention to the trial will be welcomed. I am not asking them to blow up the courthouse but that would certainly draw attention.'

(11) "that Mr. Kunstler was quoted as being proud to be associated with Mr. Banks as he represents the finest of the pacifist anti-war movement;

(12) "that Mr. Banks is a black man who was sent to jail for his beliefs in the value of human life and the dignity of all people at a time when many who have much more to defend chose alternatives to incarceration;

(13) "that Mr. Kunstler sees this indictment as a political attack by the prison administration on an individual who firmly stands for his beliefs, who is articulate and a spokesman for "Black Liberation and Pacificism," and therefore a threat to the smooth-running oppression that is so much a part of prison life in this country today;

(14) "that Mr. Kunstler is quoted as saying, 'This case typifies the strategy used to quiet dissent among inmates, for the case is such that due process is virtually an impossibility.'

(15) "The moment he [Banks] went into prison he was doomed.' "

(16) " 'the only successful way to defend your self against charges such as those against Banks is by creating a a [*sic*] complete support group around the trial, that includes demonstrations and making sure every court session has a full house and listing celebrities who are interested in the case . . . and Kuntsler [*sic*] had a comment concerning draft evaders and the granting of amnesty. . . .' "

Mr. Kunstler did not dispute these statements and expressed his right to make them and an intention to con-

tinue. Petitioner concluded that such public statements violated the rules of court and ethical standards of the legal profession concerning pretrial publicity, that such violations and Mr. Kunstler's indication that he would continue threatened a trial fair to both defendant and the public and the orderly administration of justice and on that basis together with a concern for Mr. Kunstler's delays in appearing for respondent denied Mr. Kunstler leave to appear. Opinion attached as Exhibit C. Thereafter, respondent brought the original action for mandamus in the Circuit Court of Appeals for the Seventh Circuit. While that action was pending Mr. Kunstler kept his promise to make more public statements concerning the case. At a promoted speech at the Indiana University Law School in Indianapolis Mr. Kunstler made the following statements:

> "* * * I was denied in two other states the right to represent defendants in criminal cases; * * * The other was in the Circuit Court in Dade County, Florida, in Miami, where a judge by the name of Murray Goodman refused to let me represent a young man named Alton Forbes, who is one of the defendants in the Vietnam Veterans Against the War conspiracy case to disrupt the Republican National Convention which will be starting in . . . very shortly. Some of you may have read that Judge Murray Goodman was indicted two weeks ago with the Mayor of Miami Beach for accepting bribes. . . . I don't raise that as the background of every one of the judges, though it wouldn't totally surprise me if that was the case, but I indicate that it is rather interesting that those who preach the righteous gospel so vigorously like Judge Murray Goodman and Al Capp to name two, are so frequently caught in the most horrendous of situations. Those of you who, that aren't familiar with Al Capp might be reminded that he just pleaded guilty to attempting to force young women to commit what the law so euphemistically describes as an act against nature . . . at a motel in Eau Claire, Wisconsin. That is another matter.

". . . On a personal level I was deeply shocked by it because it [the pending case involving respondent Banks] was the first time in any federal case that I ever heard a United States District Judge deny an attorney the right to represent the person who desires his services. It was done in a cold and crass and criminal manner by a judge [Holder] who, in doing so, committed a crime. He violated the civil rights of a defendant. Under any ordinary set of circumstances, if the law was just and honest, he should be indicted for what he did. He violated his oath of office; he violated his oath as a member of his profession, and he violated every tenet of human decency in doing it. * * * "

"Write a letter to the judge, write a letter to the newspapers. Picket the courthouse, do anything that will contribute to the issue."

"There is a committee here for Arthur Banks and anyone that wants any information about that can reach that committee through the law offices of Barnhart and Allison."

Following the speech a taped interview was held with an Indianapolis radio station during which Mr. Kunstler made the following comments:

"* * * The Judge here, Judge Holder, has said that he is not going to permit me to appear in his Court, which means that I can't represent Arthur Banks, which means that I am disbarred as far as this Court is concerned, and he is doing it for no good reason whatsoever, other than his own innate prejudice against me. * * *"

". . . it would seem to me any lawyer worth his or her salt would be writing to the Editor, writing to the Bar Association, writing to the Judge, writing to the Court of Appeals for the Seventh Circuit, and saying, 'Look here, we may or may not agree with William M. Kunstler, but that is not the issue before us. The issue is, are we going to rape the Constitution by allowing a Federal Judge to do what the Constitution says he should never do, and that's to deprive a defendant of his right to an attorney of his choice.' "

"I don't think anyone should respect the law, not certainly as it's practiced in America."

"* * * It [the law] is neither fair nor just, because it's manipulated and utilized. . . . And in its own procedures and practices it's unfair as well; built in, deliberately, I think, into the system. I think the best use is to distrust it, strip it of all its mysticism; to demonstrate, to fill courtrooms, to confront it. * * * We would think nothing peculiar at all about picketing Congress or picketing the White House—why not picketing the Court? * * *

"I think that the only answer in all of these systems, is confrontation. Physical confrontation. * * *"

While the mandamus action below was being considered on a petition for rehearing, and during which the court had issued a stay of its original order, the effect of such stay being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler nevertheless attempted to initiate a habeas corpus action on behalf of respondent. That suit was asigned to the Hon. S. Hugh Dillin, another judge of the United States District Court for the Southern District of Indiana. Judge Dillin noted that the petition was not signed by respondent but only by Mr. Kunstler. Judge Dillin, noting other defects in the petition and being apprised of the pending proceedings in the Court of Appeals, concluded that the petition was nothing more than a sham proceeding by Mr. Kunstler to get the district court to recognize him as counsel for the respondent. See opinion attached as Exhibit D. Then on October 6, 1973, after Mr. Justice Rhenquist had granted a stay of the Court of Appeals' decision, the effect of such stay again being to deny Mr. Kunstler the right to represent respondent, Mr. Kunstler filed another mandamus action, this time against Judge Dillin. True to form Mr. Kunstler then called a press conference before an Indianapolis radio station during which he made the following statements:

"'• • • I think it's a frightful thing that has been done to him [Banks] by the Government of the United States, the American Bar Association, 21 of the so-called prestigious Indiana lawyers who filed against him, and a United States district judge by the name of Dillin, who is being sought to be impeached because of his integration decree in Indiana and while I'd oppose his impeachment on those grounds, I would wholeheartedly support it for what he has done to this black man in Terre Haute. He has violated his oath of office and he has denied this man the most fundamental of rights. He has ignored his habeas corpus. He has succeeded in stalling his case long enough for the Government to catch up with Justice Rehnquist in Washington and to put his case in limbo where it cannot move. And those who say to American citizens, trust in the system and do not adopt alternative methods, may some day remember this case along with others when people refuse to trust the system. It's about the worse instance in my career of some 25 years that I have ever seen. Judge Hoffman pales into insignificance when you compare him to Judge Dillin, because Judge Hoffman was at least honest. Judge Dillin is a fraud. And, I think he has done a [sic] enormous injustice to Arthur Banks and he probably has done it because he is trying to avoid the anger of the citizens of Indiana for his integration decree and so he has decided to destroy Arthur Banks in order to get back on the establishment's bandwagon. It's a very sad and desperate thing, I think, that a Federal judge will violate his oath of office in this fashion, but I gess [sic] it's not unexpected since the President of the United States does it regularly.

"'Well, in this case, it's an alliance between the United States government, the American Bar Association, the Indiana Bar or what they call prestigious members of the Indiana Bar and the Federal Judges in this District, Judge Holder, Judge Dillin and others. And it's a vicious cycle, one feeds into the other. It's a criminal conspiracy to subvert the Constitution. And these men like Dillin and Holder are criminals and it's just too bad that American people don't recognize who

the real criminals are in their midst. They are not in Terre Haute prison. They sit in White Houses and State Houses and they sit on benches and they destroy human beings. And I don't know what should be done to them. I have several ideas.' "

Thereafter the Court of Appeals denied the application for mandamus against Judge Dillin.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH AMENDMENT DOES NOT IMPAIR THE AUTHORITY OF A TRIAL COURT TO DENY LEAVE TO UNADMITTED COUNSEL TO APPEAR *PRO HAC VICE* BECAUSE OF CONDUCT CONTRARY TO THE COURT'S RULES AND THE ETHICAL STANDARDS OF THE PROFESSION.

The Sixth Amendment declares that an accused enjoys the right "to have the assistance of counsel for his defense." However, this right is not absolute. "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no *arbitrary* action prohibiting the effective use of such counsel. *The conclusion becomes inescapable, therefore, that although the right to counsel is absolute, there is no absolute right to a particular counsel.*" *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1215 (3rd Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). (Emphasis supplied.)

Since the right to counsel means the right to be represented by a member of the bar, it does not extend to persons not admitted to practice or who have been excluded from practice permanently or temporarily. Thus the Sixth Amendment does not give an accused the right to select an attorney previously admitted in the jurisdiction whose right to practice has been suspended for unethical conduct,

and this would apply to exclusion for misconduct in the particular case as well as to a general suspension.

It has long been the general practice of courts to allow foreign counsel to appear *pro hac vice*.

That is far from saying, however, that a defendant has a constitutional right to be represented by foreign counsel. "It is well settled that permission to a nonresident attorney, who has not been admitted to practice in a court, to appear *pro hac vice* in a case there pending is not a right but a privilege, the granting of which is a matter of grace resting in the sound discretion of the presiding judge." *Thomas* v. *Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957), *cert. denied sub nom., Fitzgerald* v. *Cassidy*, 355 U.S. 958 (1938), in which the nonresident lawyer engaged in unspecified "unlawyerlike" conduct. See also *People of the State of New York* v. *Epton*, 248 F.Supp. 276, 277 (S.D. N.Y. 1965); *In re Henry*, 40 N.Y. 560 (1869); *Manning* v. *Roanoke & T. R. Co.*, 122 N.C. 824, 28 S.E. 963 (1898); *Youmans* v. *Hanna*, 35 N.D. 479, 160 N.W. 705 (1916); *In re Pierce*, 189 Wis. 441, 207 N.W. 966 (1926).

Nevertheless, the exercise of discretion must be reasonable and not arbitrary. As a practical matter, since it is desirable to allow a defendant to be represented by an attorney of his choice, this means that a defendant's request to be represented by outside counsel, in association with local counsel, will be granted unless good cause for denial appears.

However, the question of whether a defendant has a right to a lawyer not a member of the local bar has seldom been presented in constitutional terms. Indeed, the powers of state and federal courts to require that attorneys practicing before them be admitted to their bars would be greatly impaired, both in principle and practice, if parties

had a constitutional right to be represented by any attorney admitted anywhere.

The Third Circuit, speaking through Circuit Judge Goodrich, in *Cooper* v. *Hutchinson*, 184 F.2d 119, 122 (3rd Cir. 1950), found such a proposition "startling", and observed (p. 122):

> "The argument for the appellants thus necessarily goes far beyond an insistence that a man charged with a capital crime in a state court must have the assistance of counsel. These appellants have had the service of counsel all the way through the prosecution of the charges against them. The narrower question here is the extent to which an accused person's choice of counsel is a constitutional right. The argument insists that there is a constitutional right, at least in a capital case, to whatever counsel an accused person pleases to have. If that counsel is not a member of the bar of the state where the prosecution is being conducted, still, the argument runs, the accused may effectively choose him just as freely as he could choose a lawyer admitted to practice locally. The person chosen by the accused may then insist upon conducting the defense in the local courts. Control by the states over the persons who may be licensed to practice law in their courts would thus be greatly diminished in every capital criminal prosecution where the accused desires counsel from somewhere else.
>
> "The length to which this argument takes one is startling. It has always been thought that the license to practice law is limited, except as a matter of grace, to persons who had fulfilled the local requirements for practice. The Civil Rights Act provision relied upon here is a powerful piece of legislation and its power has ben recognized by this Court. But we have never been asked to take it this far. The Bergamo case, which has been pressed upon us, is not conclusive here, for in that case we were only laying down qualifications for the trial of cases in the federal courts of this circuit."

Since outside counsel had been already admitted *pro hac vice* in the *Cooper* case, the Court found it necessary to hold only that a right thus granted, "may not, without cause, be taken away", without passing upon the "broad question" of the right of outside counsel to appear in the first instance.*

The argument that a criminal defendant has a constitutional right to an out of state attorney was recently rejected by the New Jersey Supreme Court in *State* v. *Kavanaugh*, 52 N.J. 7, 243 A.2d 225, 231 (1968), *cert. denied sub nom., Matzner* v. *New Jersey*, 393 U.S. 924 (1968), with the Third Circuit concurring:**

> "Mr. Bailey's clients urge a constitutional right to select an attorney who is not a member of our Bar. So long as the Bar of our State is able, willing and free to provide effective counsel, there is no such right. Thomas v. Cassidy, 249 F.2d 91 (4 Cir. 1957), certiorari denied, Fitzgerald v. Cassidy, 355 U.S. 958, 78 S.Ct. 544, 2 L.Ed2d 533 (1958); People of State of New York v. Epton, 248 F.Supp. 276 (S.D. N.Y. 1965); see Parker v. Parker, 97 So.2d 136 (Dist. Ct. App. Fla. 1957); Johnson v. DiGiovanni, 347 Mich. 118, 78 N.W.2d 560, 565 (Sup. Ct. 1956). This is not a situation in which no member of the local Bar will act. See Lefton v. City of Hattiesburg, Mississippi, 333 F.2d 280 (5 Cir. 1964)

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* *In United States* v. *Bergamo*, 154 F.2d 31, 33 (3rd Cir. 1946), where there was no suggestion of improper conduct on the part of the attorneys selected by the defendants, the same Circuit had said "To hold that defendants in a criminal trial may not be defended by out of the district counsel selected by them is to vitiate the guarantees of the Sixth Amendment." The constitutional basis for this dictum was repudiated in the Circuit opinion quoted in the text, written by Circuit Judge Staahl who had been a member of the panel in *Bergamo*.

** The United States District Court refused to overturn the decision of the New Jersey Supreme Court saying that it could "add nothing" to that court's "comprehensive and well reasoned decision." *Matzner* v. *Brown*, 288 F.Supp. 612 (D. N.J.), aff'd, 410 F.2d 1376 (3rd Cir. 1969), cert. denied, 396 U.S. 1015 (1970).

> There is no dearth of competent attorneys in our State ready to meet the constitutional right to counsel. There is nothing provincial about the requirement for admission to practice in the courts of a State. The courts of every jurisdiction must have control of practice before them as an 'incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct insullied.' Cohen v. Hurley, 366 U.S. 117, 123-124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156, 162 (1961)."

Occasional statements that a defendant's right "to be heard through his own counsel was unqualified" (*Chandler v. Fretag*, 348 U.S. 3, 9 (1954)) and that the right to counsel of one's own choice is "absolute and no showing of special circumstances is necessary" (*Reickhauer v. Cunningham*, 299 F.2d 170, 172 (4th Cir. 1962)) were made in cases in which defendant was allowed no effective legal representation and which did not in any way involve a question of non-local counsel or the failure of selected counsel to comply with court rules or ethical standards. And there are cases, such as *Bergamo* and *Magee v. Superior Court*, 8 Cal.3d 949, 106 Cal. Rptr. 647, 506 P.2d 1023 (1973), holding that leave to appear *pro hac vice* may not be denied without good reason; neither case involved any charge of unethical conduct.*

As the *Kavanaugh* and *Rundle* cases (all *supra*) show, at least two factors have been recognized as good cause for denying retained counsel, both in and out of state, leave to appear. One is the inability of such counsel to serve without unduly delaying the trial. "Desirable as

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* In the *Magee* opinion the California court stated that the defendant's choice of retained counsel "can constitutionally be forced to yield only when it will result in significant prejudice to the defendant himself or in a *disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.*" 506 P.2d at 1025 (Emphasis supplied.).

it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice." *United States ex re. Carey* v. *Rundle*, 409 F.2d 1210, 1214 (3rd Cir. 1969); *United States V. Hampton*, 457 F.2d 299, 301 (7th Cir.), *cert. denied*, 409 U.S. 856 (1972); *United States* v. *Cozzi*, 354 F.2d 637, 639 (7th Cir.), *cert. denied*, 383 U.S. 911 (1966); *United States* v. *DiStephano*, 464 F.2d 845, 846 n. 1 (2d Cir., 1972); *United States* v. *Pigford*, 461 F.2d 648 (4th Cir. 1972).

The second factor is whether the outside lawyer has engaged in "unlawyerlike," unethical or illegal conduct in relation to the particular case. So far as petitioner has been able to ascertain, *every* court which has mentioned lawyers' misbehavior, whether by way of holding or dictum—and fortunately there are few such cases—has indicated that it is a legitimate ground for excluding an outside attorney from a case. Holdings: *Thomas* v. *Cassidy*, *State* v. *Kavanaugh*, *Matzner* v. *Brown*, all *supra*; *Parker* v. *Parker*, 97 So.2d 136 (Fla. Ct. of App. 1957). Dicta: *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968); *Spanos* v. *Skouras Theatres Corp.*, 364 F.2d 161, 168 (2d Cir. en banc, 1966), *cert. denied*, 385 U.S. 987 (1966); *Atchison, Topeka & Santa Fe Ry. Co.* v. *Jackson*, 235 F.2d 390, 393 (10th Cir. 1956).

Petitioner submits there is no better reason to deny a lawyer leave to appear *pro hac vice* than his refusal to abide by the rules of the court and the ethical standards of the legal profession, which in this case coincide. Particularly must this be true when the rules and standards in question are designed to insure a fair trial and when the subsequent statements and acts of the lawyer manifest an intention to continue to engage in the same kind of con-

duct. Indeed, unless the Rule, the Code and the canons are unconstitutional, this would seem to be the most compelling reason for not allowing outside counsel to appear.

In *Kavanaugh*, which also involved public statements by out-of-state counsel, the Supreme Court of New Jersey recently ordered F. Lee Bailey removed as counsel (243 A.2d at 231):

> "It is not easy for us to oust counsel of a client's choice. But the misbehavior here is so gross that we cannot risk more of it. We have searched for some evidence that Mr. Bailey would stay in bounds, but unhappily we cannot find it. There must be a fair trial, *both for a defendant and for the State*. The conduct here involved invaded that interest. But of even greater moment than the interest of the immediate parties is the interest of the public in the integrity of the judicial process. The antics here involved spill over upon the right of all litigants to expect justice in the courtroom and in accordance with the rules of law. We have weighed again and again whether that larger interest could be served by a subsequent disciplinary proceeding alone, and we are constrained to find that it would not. We must therefore affirm the order." (Emphasis supplied.)

Kavanaugh and its companion case in the federal courts (*Matzner* v. *Brown*, *supra*, p. 15) were cases in which "a defense counsel's course of conduct involving pretrial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing."

Standard 3.5 of the ABA Project on Standards for Criminal Justice, *Standards Relating to the Function of the Trial Judge* (1972 (pp. 45-46)* recognizes both that a defendant's request to be represented by an outside attorney

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* These standards were recommended by the Advisory Committee on the Judge's Function and approved by the ABA House of Delegates in August, 1972.

should be given "great deference" and that permission may be denied an attorny who misbehaves:

> "3.5 Attorneys from other jurisdictions.
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> "If an attorney who is not admitted to practice in the jurisdiction of the court petitions for permission to represent a defendant, the trial judge may
>
> "(a) deny such permission if the attorney has been held in contempt of court or otherwise formally disciplined for courtroom misconduct, or if it appears by reliable evidence that he has engaged in courtroom misconduct sufficient to warrant disciplinary action;"

Although subparagraph (a) specifically refers only to "courtroom misconduct", the Committee's Commentary makes it clear that this enumeration only "sets forth some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted." The Commentary states (p. 46):

> "Great deference should be given to the request of a defendant to be represented by counsel of his choice. Yet there is no absolute right to be represented by counsel who is not admitted to practice in the jurisdiction of the court. Subparagraph (a) sets forth *some grounds (by no means exclusive) upon which a judge might justifiably decline to permit counsel to be specially admitted;* and subparagraph (b) suggests some conditions which might be imposed, with the objective of minimizing the risk that a trial may be aborted by misconduct of counsel. *No rigid rules are appropriate, however, and each application should be considered on its own circumstances.* The trial judge should apply the law of the forum in determining whether this misconduct brought to his attention would warrant disciplinary action." (Empasis supplied.)

A trial judge may properly regard out-of-court misconduct likely to interfere with a fair trial as grounds for denying leave to appear specially.

Of course, refusal to comply with the rules of court and ethical standards is also good cause for denying admission to the bar in the first instance, and for suspension or disbarment once an attorney has been admitted. The right of an accused who wishes to be represented by a lawyer not admitted to the local bar can be no greater than that of a defendant with local counsel. Since special permission to appear must be granted in such cases, the Court must have at least as broad an authority to deny leave as would a court to which the attorney was admitted; indeed, the discretionary character of the application for leave suggests that the authority in dealing with such applications should be broader.

One reason is the lesser ability of a court to discipline or control attorneys not members of its bar. Some attorneys may feel less impelled to act respectfully or otherwise comply with ethical standards in courts in which they do not have to continue to practice. Compare *State* v. *Kavanaugh, supra.* Another reason is that disbarment or suspension is a much more drastic sanction than exclusion from a single case in a court which the attorney does not generally practice.

Neither the Sixth Amendment nor any other principle of law guarantees a defendant the right to be represented by counsel not admitted to the local bar who has violated and threatens to violate the ethical standards embodied in the Court's rules and the Code of Professional Responsibility.

The critical issue remains as to whether the rules of ethical considerations which condemn Mr. Kunstler's conduct are incompatible with the First Amendment.

II. THE ETHICAL STANDARDS HERE IN ISSUE ARE COMPATIBLE WITH THE FIRST AMENDMENT.

A. The Rules Against Pretrial Publicity by Counsel in a Criminal Case.

Mr. Kunstler contends that the portions of Rule 27 and DR 7-707 of the Code of Professional Responsibility here involved are "facially unconstitutional."

It may be assumed that the First Amendment would preclude a prohibition against similar statements by the press or other persons not counsel for parties to the litigation. The test would then be whether there was "a serious and imminent threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 373 (1947); *Bridges* v. *California*, 314 U.S. 252, 263 (1941); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Wood* v. *Georgia*, 370 U.S. 375, 384-385 (1962). Those cases impose a heavy burden which the prohibitor of such statements must satisfy. "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Bridges, supra*, at 263, quoted in *Wood*, at 384. "To warrant a sanction '[t]he fires which [the expression] kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil." *Craig* v. *Harney*, at 376, quoted in *Wood* at 385.

This test, petitioner submits, is not applicable to statements by lawyers in relation to pending litigation. The ethical standards of the profession, embodied for many years in the Canons of Professional Ethics and now in the Code of Professional Responsibility, have long disapproved of public statements by trial counsel which might influence the outcome of a trial. The philosophy underlying this limi-

tation is well stated in EC 7-33 of the present Code, *supra*, p. 4.

Former Canon 20 was designed to deal with the problem. It provided:

> "20. *Newspaper Discussion of Pending Litigation*
> "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement."

In 1964 the Supreme Court of New Jersey relied on this Canon as prohibiting "statements to news media by prosecuting attorneys" which had "the capacity to interfere with a fair trial." *State* v. *Van Duyne*, 43 N.J. 368, 204 A.2d 841, 852, 11 A.L.R.3d 1086, 1102 (1964). The same ban, the New Jersey Supreme Court continued (204 A.2d at 852):

> ". . . applies as well to defense counsel. The right of the State to a fair trial cannot be impeded or diluted by out-of-court assertions by him to news media on the subject of his client's innocence. The courtroom is the place to settle the issue and comments before or during the trial which have the capacity to influence potential or actual jurors to the possible prejudice of the State are impermissible."

In *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966), this Court aced up to the difficulties in reconciling the constitutional guarantees of a fair trial and a free press. The Court there reversed Dr. Sheppard's conviction for murder on the ground that "prejudicial news items [traceable] to the prosecution, as well as the defense" (p. 361) deprived

the defendant of a fair trial. The Court went further, however, to suggest means whereby the courts could lawfully adopt "remedial measures that will prevent the prejudice at its inception" (p. 363). In strong, indeed mandatory language, this Court declared (p. 363):

> ". . . The courts *must* take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is high censurable and worthy of disciplinary measures." (Emphasis supplied.)

With respect to extrajudicial disclosures by counsel, the Court was quite explicit, in language from which Rule 27 and DR 7-707 were plainly drawn. The Court said, citing the *Van Duyne* decision of the New Jersey Supreme Court and former Canon 20 (p. 361):

> "More specifically, the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters, such as the refusal of Sheppard to submit to interrogation or take any lie detector tests; any statement made by Sheppard to officials; the *identity of prospective witnesses or their probable tetimony; any belief in guilt or innocence; or like statements concerning the merits of the case.* See *State* v. *Van Duyne*, 43 N.J. 369, 389, 204 A.2d 841, 852 (1964), in which the court interpreted Canon 20 of the American Bar Association's Canons of Professional Ethics to prohibit such statements. . . ." (Emphasis supplied.)

Subparagraphs (5) and (6) of DR 7-107(B) and (4) and (6) of the third paragraph of Rule 27, *supra*, pp. 4, 5, the provisions most directly involved here, were obviously

derived from the emphasized references in the above passage.

The impact of these pronouncements in the *Sheppard* case is described in the Report of the Kaufman Committee of the Judicial Conference on the *Operation of the Jury System on the "Free Press-Fair Trial" Issue,* published in 45 F.R.D. 391 (1969).

> "It was in Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966), that the Supreme Court laid down a mandate to the courts to deal with the problems caused by the impact of publicity on the jury system. . . . (P. 395.)
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> • • •
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> "The adjuration of Sheppard v. Maxwell has given impetus to one of the most searching debates in recent legal history as to methods of solving the problems of fair trial and free press. In December 1966, the American Bar Association's Advisory Committee on Fair Trial and Free Press under the Chairmanship of Justice Paul C. Reardon of the Massachusetts Supreme Judicial Court released a tentative draft of its report. This report, the product of more than 20 months of study and labor by the Committee and its Reporter, Professor David L. Shapiro of the Harvard Law School, contains specific recommendations on how the impact of publicity on the administration of criminal justice can be controlled. . . ." (P. 397.)

The Reardon Committee's proposal was approved by the American Bar Assocation in 1968, and subsequently incorporated in DR 7-107 of the Code of Professional Responsibility, approved by the American Bar Association in 1970.

The Kaufman report was the work of a committee of the Judicial Conference of the United States headed by Circuit Judge Kaufman of the Second Circuit and a subcom-

mittee chaired by District Judge Gignoux of Maine.* The report stated (45 F.R.D. at 407);

> "The Committee is recommending the adoption in substance of the proposed Canon as it appears in Section 1.1 of the Proposed Final Draft of the Reardon Report. In the interest of establishing a uniform standard of conduct for attorneys in criminal cases in both the state and the federal courts throughout the country, the Committee feels that there is merit in adopting in substance the formulation proposed to be included in the American Bar Association's Code of Professional Responsibility.
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> • • •
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> "The Committee recommends action in three major areas. First, it feels that each United States District Court has the power and the duty to control the release of prejudicial information by attorneys who are members of the bar of that court, and it recommends action by local rule to restrict the release of such information on penalty of disciplinary action. (P. 401.)
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> ". . . At its February 1968 session, the Judicial Conference of the United States agreed to accept this report for study, and to that end *directed that it be circulated to all federal judges with a request that their comments and suggestions be communicated to the Committee no later than July 1, 1968.* The *individual and collective opinions* of federal judges reported to the July 18th meeting of the Committee *overwhelmingly reflected general satisfaction* with all recommendations of the report. . . ." (P. 400.) (Emphasis supplied.)

"The Kaufman Committee Report was subsequently adopted by the Judicial Conference of the United States and implemented by Local 'Free-Press—Fair Trial' Rules promulgated by each District Court." *United States* v. *Dickinson*, 465 F.2d 496, 505 (5th Cir. 1972).

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* The committee was composed of three circuit judges and nine district judges.

No subsequent opinion of this Court in any way impairs the authority of the portion of the *Sheppard* opinion from which the rule was taken. In these circumstances, Mr. Kunstler's argument that the Rule and Code are "facially unconstitutional" is, to say the least, unpersuasive.

That such restrictions on the conduct of the litigating lawyer would be constitutional was foreshadowed in *In re Sawyer*, 360 U.S. 622 (1959), in which this Court was confronted with a problem similar in many respects to that presented here. While a trial charging conspiracy in violation of the Smith Act was going on, one of trial counsel made a public speech which the Supreme Court of Hawaii and the Ninth Circuit construed as an attack upon the integrity of the federal district judge and his fairness and impartiality in trying the case. The Hawaiian Supreme Court suspended the lawyer from practice for one year. Although five justices of this Court, including Mr. Justice Stewart in a concurring opinion, voted to reverse on the ground that the attorney was at most "voicing strong criticism of Smith Act cases and the Government's manner of proving them," the four dissenters and Mr. Justice Stewart expressed the view that the attorney could have been disciplined if her remarks had violated the standards of the profession, as Justices Frankfurter, Clark, Harlan and Whittaker (but not Stewart) thought they had.

Mr. Justice Frankfurter's opinion, which on the constitutional question represented the views of a majority of the Court, stated (360 U.S. at 668):

> ". . . Here was a public meeting addressed by counsel for the defense, haranguing a crowd on the unfairness to the defendant of the proceedings in court, *with the high probability indeed almost certainty under modern conditions that the goings-on of the meeting would come to the attention of the presiding judge and the jury.* It took place in a case in which public interest and public

tempers had been aroused. When the story of the meeting came to the attention of the judge, he felt obliged publicly to defend his conduct. *It is hard to believe that this Court should hold that a member of the legal profession is constitutionally entitled to remove his case from the court in which he is an officer to the public and press,* and express to them his grievances against the conduct of the trial and the judge. '*Legal trials,*' said this Court, '*are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.*' *Bridges* v. *California,* 314 U.S. 252, 271.

"Even in the absence of the substantial likelihood that what was said at a public gathering would reach the judge or jury, conduct of the kind found here cannot be deemed to be protected by the Constitution. An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense. He does not lack for a forum in which to make his charges of unfairness or failure to adhere to principles of law; he has ample chance to make such claims to the courts in which he litigates. As long as any tribunal bred in the fundamentals of our legal tradition, ultimately this Court, still exercises judicial power those claims will be heard and heeded." (Emphasis supplied.)

Mr. Justice Stewart faced up to the problem whether the litigating lawyer was bound by the ethical standards of the profession. He stated:

"If, as suggested by my Brother Frankfurter, there runs through the principal opinion an intimation that a lawyer can invoke the constitutional right of free speech to immunize himself from evenhanded discipline for proven unethical conduct, it is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.

> *"Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.* * * *
>
> "In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of a case to which the language of the dissenting opinion seems largely directed. * * *" (Emphasis supplied.)

The *Sawyer* case parallels this case in two respects. In the first place, the litigating lawyer there as here sought to try his case "through the use of the meeting-hall, the radio, and the newspaper", with a high probability that what was said "would come to the attention of the presiding judge and jury." Secondly, the *Sawyer* case was concerned with a public challenge to the trial judge's integrity and impartiality, as to which see pp. 8, 9, 11, 12, *supra*. As to both points Mr. Justice Frankfurter's opinion states that such behavior by trial counsel is not protected by the First Amendment, and Mr. Justice Stewart indicated agreement on the law though not as to the interpretation of the substance of the lawyer's remarks in that case.

Thus the opinions of Justices Stewart and Frankfurter together indicated that the majority of this Court was of the view that the First Amendment did not preclude the temporary disbarment of trial counsel for statements which might affect the fairness of a pending case. Since the instant case concerned only the discretionary authority to grant leave to appear *pro hac vice*, the District Court's action did not go that far.

The Court of Appeals below relies on *Chase* v. *Robson*, 435 F.2d 1059 (9th Cir. 1970). The scope of the prohibitions involved in the *Chase* case may have warranted application there of the broad First Amendment standard of "clear and present danger" or "serious or imminent threat to

the administration of justice". But to read those cases more broadly as governing cases like this, would make them inconsistent with the authorities discussed earlier in this brief, the *Sawyer* and *Sheppard* cases in particular, which demonstrate that the test is different for counsel actually participating in a criminal case. These authorities establish that specific prohibitions such as those contained in DR 7-107 and Rule 27 may be generally enforced without further showing of a likelihood that their violation in each individual case will seriously prejudice the administration of justice. Indeed, the suggestion in *Sheppard* (384 U.S. at 363, *supra*, p. 30) that "courts must take steps by rule and regulation" means that a general rule governing the conduct of counsel was both called for and constitutional.

The Court of Appeals in *Chase* referred to "the lesser standard" of reasonable likelihood of a "serious and imminent threat to the administration of justice". The phrase "reasonable likelihood" appears both in *United States v. Tijerina*, 412 F.2d 661, 663 n. 1, 666 (10th Cir. 1969), and in the introductory paragraph to the Reardon and Kaufman committee proposals embodied in District Court Rule 27.

In the *Tijerina* case the Tenth Circuit rejected the contention that a clear and present danger test governs the application of an order prohibiting outside publicity in a particular case, saying (412 F.2d at 666):

> "Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a 'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial."

The Court then pointed out that in *Sheppard* the Supreme Court "established guidelines necessary to assure a fair trial in a case which attracted wide publicity" (p. 667), and concluded:

> "The ultimate question is whether the application to the defendants of an order against extrajudicial statements violates their rights of freedom of speech. The defense argument necessarily places freedom of speech in a preferred position above fair trial. . . . This preferred position has never been approved in a case where a balance must be had between free speech and fair trial. Indeed, the Court has awarded the preference to fair trial. . . .
>
> "The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, 'the most fundamental of all freedoms.' . . ."

The text of Rule 27 (which is the rule recommended by the Judicial Conference and the Kaufman committee) demonstrates that the prohibitions upon the public dissemination by trial counsel of statements with respect to the enumerated subjects was not to be watered down by requiring proof of more than the fact that these specific prohibitions had been disregarded.

Rule 27 enumerates the specific restrictions on counsel after arrest or the filing of a complaint, information or indictment. With respect to the six specific subparagraphs, the Kaufman report describes the Reardon committee recommendation (which it adopted) as contemplating (45 F.R.D. at 407):

> ". . . *an absolute prohibition* of extrajudicial disclosure by attorneys of prior criminal records, confessions, tests, witnesses, opinions as to the guilt or innocence of the accused, the merits of the case or the evidence involved, as well as other described matters potentially prejudicial in nature." (Emphasis supplied.)

Thus clearly it was not contemplated that further evidence would be necessary in every case to show that the prohibited disclosures were reasonably likely to interfere with a fair trial or the administration of justice. On the contrary, the whole purport of the recommendations and the Rule was that there would be a reasonable likelihood of such an interference whenever the types of statements specifically prohibited occurred while the criminal case was pending, and that therefore a general prohibitory rule —"an absolute prohibition"—was justified.

It is submitted therefore that the criteria which govern the protection of First Amendment freedoms in other circumstances—the need for proof of "a serious or imminent threat" or "a clear and present danger" in a particular case—is not an appropriate guide to determining the propriety of public statements by trial counsel during the pendency of litigation. It must be sufficient, if the objects of the constitutional provisions which seek to guarantee impartial justice are to be achieved, that the rules governing attorneys' conduct prohibit the types of statements which are generally reasonably likely to interfere with the fairness of trials.

The majority of the Supreme Court in *Sawyer* and *Sheppard* obviously did not believe that the *Bridges-Pennekamp-Craig* doctrine was applicable in such circumstances. Accordingly, the invocation of the doctrine of the later cases in the Court of Appeals' decision in *Chase*, while perhaps not inappropriate for the facts presented in that case, should not be extended so as to nullify the specific guidelines to an attorney's conduct embodied in Rule 27 and DR 7-107 of the Code of Professional Responsibility.

B. The Incitations to Demonstrate and Fill the Courtroom.

In the course of the speech and press interview in which he communicated to the public his views as to the credibility of possible witnesses and the merits of his client's case, Mr. Kunstler also urged his listeners to "organize demonstration [sic] in support of Banks," "to fill the courtroom with sympathetic spectators during the trial," "to do everything possible to support the trial" and "anything they can do to call attention to the trial will be welcome. I am not asking them to blow up the courthouse but that would certainly draw attention." His broadcast urged "physical confrontation. . . ." "Picket the Courthouse, do anything that will contribute to the issue." See pp. 7, 9, 10, *supra*. Before the District Court he insisted he had a right under the First Amendment to do this.

The obvious purpose of these remarks was to aid his client by putting pressure on the judge and jury, to influence them through factors entirely extraneous to what would come before them in the ordinary course of an orderly hearing. There is no other way in which Mr. Kunstler could have thought that organizing demonstrations, filling the courtroom, picketing the courthouse or drawing public attention to the trial could have helped him.

Neither the Code of Professional Responsibility nor any Rule of Court in precise words prohibits an attorney from engaging in conduct of this sort—perhaps most lawyers do not have to be told that it would undermine the just functioning of our system of law. DR 1-102(A)(5) and EC 7-36, quoted at pp. 4, 5, *supra*, which forbid "conduct prejudicial to the administration of justice," and conduct "that offends the dignity and decorum of proceedings," come the closest. But for counsel to attempt to influence judges and juries by inciting demonstrations or by filling

the courtroom more seriously prejudices the fair and lawful administration of justice than mere breaches of dignity or decorum. And this is so even if it be assumed that demonstrators will not be violent, and that the attorney will not deliberately stimulate disorder in the courtroom; a courtroom packed with enthusiasts for one side has an obvious potential for such disorder, as any knowledgeable person would recognize.

The underlying concept of fairness in judicial proceedings is that cases will be decided on the facts in evidence and under the law as understood by the judge, without outside influence. An attempt to bring extraneous factors to bear on judge and jury is thus an effort to subvert the foundation of the judicial process. It may be that judges and juries are not always influenced by all outside considerations. But this does not excuse a litigating lawyer who deliberately incites others to exert or to attempt to exert outside influence as a tactical device. Such conduct clearly goes beyond permissible means of zealously representing a client.

This would be patently obvious if many lawyers in many cases sought to arouse the public to demonstrate or pack courtrooms in support of their clients. Unless the practice was halted, the fair administration of justice would become impossible. And such tactics do not become more tolerable because exercised in behalf of members of minority groups, or only in cases which lawyers are convinced of their clients' rectitude and fear that the unpopularity of their cases may make it difficult for them to win. These are precisely the situations in which an unpressured tribunal is the most vital. For pressure and influence may be exerted more powerfully by majorities than minorities.

Since the incitations in question would be "prejudicial to the administration of justice" in contravention of DR

1-102(A)(5), the attorney's action is not protected by the First Amendment. The basic reason is the same as for violations of the Code provisions governing pretrial publicity, discussed at pp. 21-31, *supra*—fair trials and due process of law are dependent upon fair and unbiased judges and juries.

The question here is not whether persons generally have a right to attend proceedings in courtrooms, or to demonstrate or organize demonstrations relating to a pending case. Whether they do or not may or will depend on the circumstances, and Mr. Kunstler's remarks are not specific as to time or place or content or noisiness or orderliness, except for his specific plea for filling the courtroom with sympathizers. The issue here is whether the Constitution guarantees the litigating attorney the right to try to influence a court in this manner. Mr. Justice Stewart's admonition in *Sawyer* (*supra*, p. 28) that an attorney may be bound by ethical precepts to abstain from what "might be constitutionally protected speech for others" is equally applicable to such statements as well as to those discussed in Point IIA. And so is the teaching of *Sheppard* v. *Maxwell*, that one means of reconciling the fair trial-free press dilemma is to leave the press and other persons free but to adopt rules restricting what the counsel for the parties may communicate to the public while a case is pending. In *Cox* v. *Louisiana* (No. 2), 379 U.S. 559 (1965), this Court upheld a statute making it a crime to picket or parade near a courthouse "with the intent of interfering with . . . the administration of justice or . . . of influencing any judge, juror, witness or court officer." The unspoken premise of the opinion was that the same sort of picketing might have been lawful in other circumstances. The majority opinion of Mr. Justice Goldberg, with no dissent on this point, said (379 U.S. at 562):

"There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See *Wood* v. *Georgia*, 370 U.S. 375, 383. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial 'in a courtroom presided over by a judge.' *Rideau* v. *Louisiana*, 373 U.S. 723, 727. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See *Frank* v. *Mangum*, 237 U.S. 309, 347 (Holmes, J., dissenting). A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence."

The *Cox* case differs from this one in that the Court there relied on the specificity of the criminal statute and because picketing and parading were regarded as conduct and not merely speech. But the same passage (p. 563) reviews the cases holding that verbal incitations to wrongful conduct do not have First Amendment protection. Verbal incitation to exert pressure on a judicial tribunal would seem to fall in the same category. Furthermore, Mr. Kunstler is not being subjected to criminal penalties, but only prevented from trying a case in a court to which he has not been admitted to practice. And Mr. Banks is not precluded from obtaining competent counsel, from Indiana or elsewhere.

CONCLUSION

The Court of Appeals attempts to suggest that petitioner was concerned solely with the right of respondent to a fair trial. Petitioner was indeed concerned with the right of respondent, but petitioner was also concerned with the rights of the prosecution and the public. Petitioner submits that such broad concern is evident in his opinion where he referred to the rights of both "Mr. Banks" and "the public . . . to a fair and impartial trial" and also the "obligation [of the Court] . . . to provide a fair and impartial trial to all parties."

However, the Court of Appeals does address the broader question which requires a balancing of the rights of all parties and the public. The Court held "before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of 'significant prejudice to the defendant himself' or of 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' "

The Court of Appeals relies only on two cases to resolve the free speech-fair trial-right to counsel issues. *Magee* v. *Superior Court of City & County of San Francisco,* 506 P.2d 1023 (1973); *Chase* v. *Robson,* 435 F.2d 1059 (7th Cir. 1970). Petitioner submits that the Court's combination of the holdings of those two cases is clearly erroneous. The conclusion based on *Chase* that an attorney's conduct must be specifically found to have a "serious and imminent threat" to a fair trial is a misplaced reliance on the law governing free speech of persons other than lawyers in a pending case. This Court in *Sawyer* and *Sheppard* clearly indicated that the conduct of lawyers participating in a pending case is subject to a different standard. Further-

more, the Court of Appeals abandoned the lesser standard it had previously recognized in *Chase*, that certain conduct may be assessed in terms of having a "reasonable likelihood" of threatening a fair trial and the administration of justice. That was the standard established in the 10th Circuit in *Tijerino*. With respect to the Court's reliance on *Magee*, it is true that the court in that case did recognize that conduct of a lawyer is an appropriate consideration in determining his admission *pro hac vice*, but the Court was not in fact concerned with any conduct of counsel and did not state that lawyer conduct when in issue must be measured in terms of whether it poses a serious and imminent threat to a fair trial.

In summary it is submitted that the court below decided a question in conflict with this Court's decisions in *Sawyer* and *Sheppard*, that the decision below is in conflict with the appellate court of another circuit, viz., *Tijerino*, and to the extent this Court has not by its prior opinions specifically sanctioned the rules regarding conduct of counsel in pending criminal cases there are presented important questions of federal law, which have not been, but should be settled by this Court.

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EXHIBIT A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 17, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS, *Petitioner,*	
No. 73-1332 *vs.*	Original Petition for Writ of Mandamus. (TH 72 CR 47)
HON. CALE J. HOLDER, United States District Judge, *Respondent.*	

Petitioner, Arthur Banks, seeks a writ of mandamus directing the respondent to vacate his orders of April 1, 1973, denying the motion of Attorney William M. Kunstler for leave to represent the petitioner in a criminal prosecution presently pending in the United States District Court for the Southern District of Indiana and denying a motion to disqualify himself, to vacate his order of April 2, 1973, appointing a new attorney for the petitioner, to appoint no other counsel for petitioner pending determination of this mandamus petition, and to disqualify himself from participating in any further proceedings in *U.S.A.* v. *Arthur C. Banks,* TH 72-CR-47. The petition

also seeks a stay of the trial proceedings, scheduled to commence on May 21, 1973, for such time as may be necessary to enable this Court to hear and determine this petition. The petition is supported by numerous exhibits, an affirmation filed by William M. Kunstler, and a "response to undated entry." The U.S. Attorney filed a motion for leave to correct and supplement defendant's petition for writ of mandamus and the petitioner filed a response to said motion. Pursuant to our order of April 13, 1973, a transcript of the proceedings held in this case on December 20, 1972, January 2, 1973, February 2, 1973, March 29, 1973, April 1, 1973 and April 3, 1973, was filed with this Court on April 19. On April 27, this Court ordered a response to the petition for writ of mandamus, pursuant to Rule 21(b), F.R.A.P. On May 14, the answer of the respondent United States of America was filed. By letter dated May 9, the respondent judge joined in said answer. In addition to the answer, U.S. Attorney has filed a "request for instructions," calling this Court's attention to the fact that this case will be tried before the Honorable James E. Noland, who is not named as a party to this mandamus proceeding.

The petition for writ of mandamus raises an important issue concerning the extent of a defendant's Sixth Amendment right to representation by counsel of his own choosing. See *U.S.* v. *Seale*, 461 F.2d 345 (7th Cir. 1972).

In denying Mr. Kunstler's application for leave to appear as counsel, the district court stated:

> "The record discloses that petitioning attorney engaged in a pattern of pre-trial publicity, i.e., public statements, interviews and press conferences with various sectors of the news media, and authorized press releases, in the Terre Haute Division of the Court as well as in Indianapolis, Indiana, which have resulted in the dissemination in newspapers, and on radio and television

broadcasts, within the Terre Haute Division of this Court, of statements by petitioning attorney regarding, among other things, the defendant's prior criminal record, the identity and credibility of prospective witnesses, the petitioning attorney's opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause all of which seriously reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Petitioning attorney also in connection with the aforementioned statements regarding the subject cause made statements analogizing the status of the defendant with certain public and political issues of current controversy which further reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia,* filling the spectator section of the courtroom and the adjacent hallways thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate the jury."

The district court also cited the delays which have occurred in bringing the case to trial since the first arraignment on December 20, 1972, and Mr. Kunstler's statement that he intended to continue similar pre-trial activity. The district court then concluded that his conduct violated both Local Rule 1(f), providing that the Code of Professional Responsibility shall be the standards of conduct for members of the Bar of that court and Local Rule 27, regarding the release of information by attorneys in criminal cases from time of indictment until trial, which rule is substantially the same as Disciplinary Rule 7-107 of the Code of Professional Responsibility of the American Bar Association.

In reviewing the papers filed in this mandamus proceeding we are impressed by the district court's deep concern for protecting the right of a defendant to a fair and impartial jury, which concern is the thrust of the above Local Rules. However, in this case, unlike most cases involving potentially prejudicial pre-trial publicity, the defendant has insisted throughout the proceedings that he is satisfied with his counsel's representation. Defendant Banks was present at the April 1 hearing in which Mr. Kunstler's public statements were discussed at length and he stated unequivocally that he wanted Mr. Kunstler as his attorney. We have not been referred to any case in which a defense counsel's course of conduct involving pre-trial publicity has been held to override the defendant's Sixth Amendment right to counsel of his own choosing. *Shepard* v. *Maxwell*, 384 U.S. 333 (1966), cited in the answer, does not involve the Sixth Amendment issue present here.

Furthermore, we note that the answer does not assert any right of the prosecution to prevent matters possibly prejudicial to its case from reaching prospective jurors, nor does it assert any inherent right of the court, independent of the defendant's Sixth Amendment rights, to limit pre-trial publicity in the interests of the orderly and fair administration of justice. Thus it is not necessary to determine at this time if such rights exist, and if so, what weight they should be given when balanced against the defendant's right to counsel.

In summary we believe that the defendant Banks has waived any right to object to Attorney Kunstler's course of pre-trial publicity as denying him his Sixth Amendment right to a fair and impartial jury. Accordingly,

IT IS ORDERED that the petition for writ of mandamus be GRANTED. The district court's order of April 1, denying Mr. Kunstler's leave to appear as counsel for the de-

fendant Banks, and the order of April 2, appointing new counsel, are vacated. Since we are advised by the U. S. Attorney that the respondent judge will not preside at the trial, no ruling is necessary on the prayer for an order directing the respondent to disqualify himself. We leave the matter of a stay of the trial proceedings to the discretion of the trial judge. We do not express an opinion as to what, if any safeguards, the trial judge may find it necessary to impose during the course of the trial to preserve fair, impartial, and orderly proceedings.

EXHIBIT B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. WILBUR F. PELL, JR., *Circuit Judge*
HON. JOHN PAUL STEVENS, *Circuit Judge*
HON. ROBERT A. SPRECHER, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the active members of the Court having voted to deny the rehearing *en banc*,

IT IS ORDERED that the petition for rehearing *en banc* be, and the same is hereby denied.

Judges Cummings, Pell, and Stevens voted to grant the rehearing *en banc*.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 1, 1973.

Before

HON. LUTHER M. SWYGERT, *Chief Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

ARTHUR BANKS,
Petitioner,

No. 73-1332 *vs.*

HON. CALE J. HOLDER,
United States District Judge,
Respondent.

Original Petition for Writ of Mandamus. (TH 72 CR 47)

ORDER

On Petition for rehearing.

We noted in our order dated May 17, 1973, that the answer did not raise the question whether prejudice to the government's case or impairment of the orderly and fair administration of justice (in a broader sense than the infringement of the interests of the petitioner) arising from Mr. Kunstler's public statement, may have justified respondent's order denying Mr. Kunstler's application.

Surely that question was not explicitly raised. The transcript of the April 1 hearing makes it clear that the chief concern of respondent was possible prejudice to petitioner. The statements by Mr. Kunstler which were brought out at the hearing covered a considerable spectrum. A few,

concerning the merits of the controversy, were clearly improper when made publicly by an attorney for a party. Others were expressions of opinion on public matters which could not be subject to any legal restraint. Although the former, if believed by the public, would create opinion adverse to the government, respondent appeared to assume that they, as well as the latter, would irritate members of the public and thus create prejudice against the petitioner. Respondent's preoccupation with possible prejudice to the petitioner is evident from the portion of the finding quoted in our original order and also the following:

> "When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause."

Much of the argument presented on motion for rehearing treats the broader issue, the task of balancing in this type of situation, the interest of the prosecution in obtaining a fair trial and the inherent right of the court to protect the public's interest in the orderly and fair administration of justice, on the one hand, against the defendant's sixth amendment right to counsel of his own choosing.

In considering the broader issue, we conclude that before a trial court may properly limit the defendant's right to a chosen counsel, there must be sufficiently supported and specific findings of fact that the conduct of the defendant's attorney creates a serious and imminent threat of "significant prejudice to the defendant himself" or of "disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." *Magee* v. *Superior Court of City & County of San Francisco*, 8 Cal. 3rd 949, 506 P.2d 1023 (1973). See *Chase* v. *Robson*, 435 F.2d 1059 (7th Cir., 1970).

Because interference with the individual's choice of counsel should be kept to the necessary minimum, in each case the trial court must consider carefully whether a less drastic alternative, such as a narrow injunction limiting particular kinds of public statements, would suffice to protect the other interests at stake. Of course, to the extent that the defendant knowingly and intelligently endorses the conduct of his attorney in making speeches and press releases, he waives his right to claim that he has been denied his sixth amendment right to a fair and impartial trial.

The findings of respondent in this case clearly did not meet this standard. Our independent review of the record reveals that the hearing did not include this broader issue within its focus, and that the evidence with respect to the statements which could be deemed improper would not support such a conclusion.

Petition for rehearing is denied.

EXHIBIT C

UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

UNITED STATES OF AMERICA *v.* ARTHUR C. BANKS	No. TH 72-Cr-47

ENTRY

The matter of Mr. William M. Kunstler's March 21, 1973 application pursuant to Rule 1(c) of the Rules of the United States District Court for the Southern District of Indiana for leave to appear as counsel for the defendant in the subject cause came on for ruling. The Court, having read and considered petitioning attorney's motion and the tendered notice of appearance received on March 21, 1973, the Government's March 21, 1973 motion for a hearing on petitioning attorney's application for leave to appear as counsel for the defendant in the subject cause, petitioning attorney's April 1, 1973 affidavit in support of his application, and having had an evidentiary hearing on this matter on April 1, 1973 wherein evidence was submitted and argument heard by all parties, and being duly advised in the premises, does now submit its ruling.

The Court, in the sound exercise of its discretion, does hereby DENY Mr. William M. Kunstler's application for leave to appear as counsel for the defendant in the subject cause for the reasons set forth below. The record discloses that petitioning attorney engaged in a pattern of pre-trial

publicity, *i.e.*, public statements, interviews and press conferences with various sectors of the news media, and authorized press releases, in the Terre Haute Division of the Court as well as in Indianapolis, Indiana, which have resulted in the dissemination in newspapers, and on radio and television broadcasts, within the Terre Haute Division of the Court, of statements by petitioning attorney regarding, among other things, the defendant's prior criminal record, the identity and credibility of prospective witnesses, the petitioning attorneys' opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause, all of which seriously reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Petitioning attorney also in connection with the aforementioned statements regarding the subject cause made statements analogizing the status of the defendant with certain public and political issues of current controversy which further reduces the prospect of obtaining a fair and impartial jury in the Terre Haute Division of the Court for trial of the subject cause. Among public statements in Terre Haute, Indiana, petitioning attorney sought and requested certain segments of the community to support the defendant's case by, *inter alia*, filling the spectator section of the courtroom and the adjacent hallways thereto which, if achieved, would be a serious impediment in the Court's ability to provide the proper judicial decorum which is conducive to a fair and impartial trial and may well act to intimidate and/or alienate the jury. The record in the subject cause is replete from the first arraignment in the subject cause on December 20, 1972 with delay occasioned by petitioning attorney's failure to appear as counsel in the subject cause. Petitioning attorney's professional work load and political activity would indicate that further delay in bringing the subject

cause to trial can be anticipated due to conflicts with petitioning attorney's schedule.

Most significantly, the record discloses that petitioning attorney stated his intention to continue in his course of activity, in form and substance, regarding his aforementioned pre-trial publicity relating to the defendant's prior criminal record, the identity and credibility of prospective witnesses, his opinion as to the defendant's innocence and as to the merits of the subject cause and evidence in the subject cause. Rule 1(f) of the Rules of the United States District Court for the Southern District of Indiana discloses that the Code of Professional Responsibility shall be the standards of conduct for members of the Bar of this Court. Inspection of Canon 7, Ethical Consideration 7-33, and Disciplinary Rule 7-107(B) of the Code of Professional Responsibility and Rule 27 of the Rules of the United States District Court for the Southern District of Indiana, copies of which are attached hereto and incorporated herein, reveal that petitioning attorney's course of pre-trial publicity is violative of the standards of conduct for members of the Bar of this Court as well as a direct breach of Local Rule 27 regarding the release of information by attorneys in criminal cases from the time of indictment in the subject cause until the commencement of trial. Petitioning attorney's statement that he intended both in form and substance to continue his pre-trial publicity activities which are violations of the Rules of this Court is sufficient in and of itself to sustain the denial of his application to appear as counsel for the defendant in the subject cause. Were petitioning attorney allowed to appear as counsel for defendant in the subject cause, his avowed course of conduct regarding pre-trial publicity in the subject cause would subject him to citation for contempt(s) of Court which would be a further impediment in providing a fair

and impartial trial in the subject cause. When petitioning attorney's conduct in the subject cause is reviewed in its entirety, the impact this must have upon potential jurors in the Terre Haute Division of the Court inevitably inures to the detriment of the defendant in the subject cause. Neither Mr. Banks nor the public can waive their right to a fair and impartial trial in the subject cause nor can the Court abrogate its obligation upon its Constitutional Oath to provide a fair and impartial trial to all parties in the subject cause. The Court has denied the petitioning attorney's application for the reasons that petitioning attorney's stated course of future conduct will be in violation of the Rules of the Court and that the opportunity to afford a fair, impartial and speedy trial to all parties in the subject cause is best served thereby.

Dated this 2nd day of April, 1973.

CALE J. HOLDER, *Judge,*
United States District Court
Southern District of Indiana

EXHIBIT D

UNITED STATES DISTRICT COURT
Southern District of Indiana
Terre Haute Division

UNITED STATES OF AMERICA, *ex rel.* ARTHUR BURGHARDT (BANKS), *Relator,* *v.* MASON HOLLEY, *Warden* United States Penitentiary at Terre Haute, Indiana, *Respondent.*	No. TH 73-C-95

MEMORANDUM OF DECISION

Heretofore, on September 17, 1973, certain papers styled as above were filed in the Office of the Clerk of the United States District Court for the Southern District of Indiana, Terre Haute Division, whereupon the Deputy Clerk in charge of the office proceeded to assign the above entitled docket number thereto. Said Deputy Clerk further caused the case to be assigned to the undersigned judge by lot, as prescribed in the General Order of the Court.

Thereafter, the Court examined said papers to determine what, if any, action should be taken with respect thereto. Examination thereof revealed that, although they purport to state a petition for a writ of habeas corpus on behalf of one Arthur Burghardt Banks, styled as "relator," the actual petitioner appeared to be "William M. Kunstler, on behalf of relator." The peculiar fashion in which the pleading was drafted suggested to the Court a threshhold question as to whether or not the same was properly cognizable as a petition for a writ of habeas corpus.

The statute governing applications for such a writ, 28 USC § 2242, reads, in applicable part, as follows:

> "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."

It was noted immediately that the petition in question was not signed or verified by the person for whose relief it was intended, i.e., Arthur Burghardt Banks. Technically, it was not verified at all, inasmuch as the cryptic notation "sworn to before me this 7th day of September, 1973," executed by a purported New York notary public whose signature is illegible, does not state who, if anyone, actually swore to the document. Without regard to this last point, however, and assuming that the document was in fact sworn to by William M. Kunstler, it would then remain to be seen whether or not he would have the authority to institute the action on behalf of Banks under the peculiar setting of the case.

By way of review, it will be remembered that there is pending on the docket of this Court a criminal action entitled United States of America v. Arthur Chester Banks, No. TH 72-CR-47. The Arthur Chester Banks named as the defendant in such action is one and the same person styled by William M. Kunstler as Arthur Burghardt (Banks). The two cases quite obviously are directly related to each other.

With respect to the criminal case, the same William M. Kunstler, a member of the New York Bar, made application to the Court for permission to enter his appearance *pro hac vice* for the defendant Banks. After a hearing had on April 1, 1972, this Court, speaking through the Honorable Cale J. Holder, one of the judges thereof, denied leave to said attorney so to appear. Thereafter, the fol-

lowing further proceedings were had with respect to said order of April 1, 1973:

1. On April 5, 1973, Arthur Banks filed an original petition for writ of mandamus against Judge Holder in the United States Court of Appeals for the Seventh Circuit as Cause No. 73-1332.

2. After extensive briefs were submitted by both Arthur Banks and Judge Holder, the Court of Appeals on May 17, 1973, rendered an opinion and granted the petition for writ of mandamus.

3. Thereafter Judge Holder filed a motion to stay the effectiveness of the decision pending a petition for rehearing and a suggestion that the rehearing be *en banc*.

4. On May 29, 1973, the Court of Appeals granted said motion.

5. In connection with the petition for rehearing additional briefs were filed by both petitioner and respondent. Also both the American Bar Association and the American Civil Liberties Union were granted leave to file briefs as amici curiae.

6. The petition for rehearing raised questions of significance to the administration of justice concerning:

> "(1) The scope of a trial court's discretionary power to deny a criminal defendant's request that he be represented *pro hac vice* by an attorney not a member of the Court's bar, and in particular
>
> "(a) whether an attorney's violation of the rules of the Court and of the ethical standards of the legal profession warrants denial of the request, and
>
> "(b) whether such a denial is forbidden by the Sixth Amendment to the Constitution.
>
> "(2)(a) Whether the Rule and ethical standards which forbid an attorney in a criminal case from making

extrajudicial statements on specific subjects for public dissemination are compatible with the First Amendment.

"(b) Whether trial counsel's deliberate incitation of sympathizers to demonstrate and pack the courtroom was protected by the First Amendment."

Therefore, on September 17, 1973, the posture of the criminal case was that William M. Kunstler was without standing in this Court as attorney for the defendant Banks. Further, as the Court knows judicially, Kunstler has never been admitted generally as a member of the bar of this Court. In short, he had no standing or status in this Court on September 17, 1973, either as attorney for Banks *pro hac vice* or as a member of the bar of this Court entitled to file pleadings generally on behalf of persons desiring to institute legal actions.

It is true that under certain circumstances it is possible for one person to act on behalf of another in connection with the filing of a petition for a writ of habeas corpus, and in such instances the writ is ordinarily filed by one person for another in the capacity of next friend. However, the law in this regard is that a writ may be entertained in such fashion only in instances under which it may not be possible or feasible that the detained person sign and verify the complaint, such as in cases where access to the person is impossible or the person is a minor or under a mental incapacity. *United States* v. *Houston*, 273 F. 915 (2nd Cir. 1921). Absent a sufficient reason being tendered by the person who seeks to intervene on behalf of another, it has been held that the Court lacks jurisdiction in personam. *Wilson* v. *Dixon*, 256 F.2d 536 (9th Cir. 1958).

The said Kunstler, in his assumed status as petitioner, states in rhetorical paragraph 19 of the petition "The reason that this petition is made by one of relator's attor-

neys rather than by relator himself is that he is, as previously stated, presently confined in a penal institution some distance from where his attorneys have their offices." The Court deemed this statement a completely insufficient reason to entertain the petition as meeting the requirements of said § 2242, for two reasons. First, it was obvious that the petition could either have been mailed to Banks for verification or could easily have been taken to him for such purpose by Brent A. Barnhart, an attorney of Indianapolis, Indiana, whose signature likewise appears on the petition. Second, Kunstler had no standing in this Court as Banks' attorney, as above pointed out.

Reference to Barnhart brings up another unique facet of these related cases in that, although Barnhart's name appears on the petition described above, as well as upon various pleadings filed in the criminal action, Barnhart himself has steadfastly maintained that he does not appear for Banks, that he has no authority to appear for Banks, and that his status is simply that of local counsel for Kunstler, whatever that may mean. Therefore, in the absence of a general appearance entered by Barnhart for Banks, Barnhart's signature appended to the foregoing petition meant to the Court that he appeared only for Kunstler and not for Banks; for such reason, his signature added nothing to the pleading.

The Court, having made the foregoing review of said papers and of the status of the various individuals mentioned was, and still is, of the opinion that the papers in question presented nothing which would require the Court to take the action contemplated by 28 USC § 2243. In this connection, the Court further noted that although the petition purportedly attached, as Exhibit D, an affidavit submitted by Banks to the United States Court of Appeals for the Seventh Circuit, no such exhibit was in fact at-

tached. If attached, and if in fact verified by Banks, such exhibit might have met the requirements under 28 USC § 2242; on the other hand, it might have contained facts which would show on their face that Banks was not entitled to relief. This Court has simply not had the benefit of being able to consider such document.

On October 1, 1973, the defendant Banks appeared in open court in connection with the criminal case, accompanied by Kunstler and Barnhart. There was an extended colloquy in open court regarding the posture of the criminal case. At that time, neither Banks, Barnhart nor Kunstler presented or offered to present any motion, comment or inquiry regarding the status of the purported habeas corpus action. Obviously, an additional or amended pleading, properly verified by Banks, could have been filed that day, or indeed at any time since September 17, 1973.

On October 2, 1973, the said Barnhart, in his capacity as local counsel for Kunstler, inquired of the Court in chambers as to what disposition the Court proposed to make the purported habeas corpus proceeding. The Court advised Barnhart that it did not consider said petition sufficient to require any action, stating the various reasons heretofore set out in this memorandum. The Court further advised Barnhart that the bizarre method of causing Kunstler to file the petition "as one of relator's attorneys" at the very time when the question of such representation was the subject of vigorous litigation in a higher Court suggested that the habeas corpus proceeding was a mere sham or ploy designed to cause this Court indirectly to recognize Kunstler as Banks' attorney, and thus moot the proceeding then pending in the Court of Appeals.

This Court further advised Barnhart on October 2, 1973, that the Court would promptly issue a show cause order pursuant to 28 USC § 2243 if Mr. Banks would take the

extremely simple step of adopting Kunstler's petition as his own and verifying same. Barnhart purported to thank the Court for its advice and appeared to indicate that Banks would follow the Court's suggestion immediately.

Instead of following such simple procedure, which would have caused the Court to issue an immediate show cause order to the respondent, Mason Holley, Mr. Banks has curiously taken the circuitous route of filing a petition for a writ of mandamus in the United States Court of Appeals for the Seventh Circuit, asking that Court to direct the undersigned, as a judge of this Court, "to grant or otherwise act as provided by applicable law" upon the petition filed September 17, 1973. To "otherwise act," of course, would be merely to issue a show cause order to the respondent—a matter which would long since have been accomplished if Banks would address himself to this Court rather than to the Court of Appeals.

Having reviewed all of the foregoing facts and circumstances this date, the Court finds as a fact that the petition filed September 17, 1973, was a sham, the sole purpose of which was to attempt to moot consideration of this Court's ruling denying Kunstler leave to represent Banks *pro hac vice* by the Court of Appeals and by the Supreme Court of the United States. The Court further states its conclusion of law that said petition of September 17, 1973, is a legal nullity because it is not verified by Banks nor by anyone authorized to act in his behalf within the meaning of 28 USC § 2242.

It is therefore considered that no action will be taken by this Court on said document pursuant to 28 USC § 2243, unless the said Arthur Chester Banks determines to act upon the suggestion of the Court as made to the said Barnhart, all as above related, within fifteen (15) days of this date. In the absence of such action within the time

fixed, the Clerk is directed to remove this matter from the active docket of the Court as improvidently filed.

All of which is considered and ordered by the Court this 15th day of October, 1973.

S. Hugh Dillin, *Judge*

Copies to:

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